

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

MISCELLANEOUS CIVIL APPLICATION NO. 46 OF 2022

FATUMA MOHAMED SABUNI

(Administratrix of the estate of the Deceased

BAKARI WEMA KIDEMU) APPLICANT

VERSUS

JOSEPH BAKARI WEMA1ST RESPONDENT

VICTOR BAKARI WEMA 2ND RESPONDENT

STEVEN BAKARI WEMA3RD RESPONDENT

AGGNESS BAKARI WEMA 4TH RESPONDENT

(Originating from decision of Mnazi Primary Court in Probate Cause No. 01 of 2021 dated 08/2/2022 and the Probate Appeal Case No. 01 of 2022 of the District Court of Lushoto at Lushoto decision dated 30/5/2022)

RULING

27/10/2022 – 29/11/2022

NDESAMBURO, J

The applicant has lodged an application for extension of time under section 14(1) of the Law of Limitation Act, CAP 89 R.E 2019 praying for this court to allow her to appeal against the decision of Lushoto District Court. The application is supported by an affidavit deposed by the applicant.

The record reveals the following background; following the demise of Bakari Wema Kidemu who died intestate, the applicant petitioned and was duly appointed as an administratrix of his estate. In the course of the administration, the respondents filed an application before Mnazi Primary court seeking her revocation. Having heard the matter, the trial magistrate ruled out that no sufficient reasons were advanced to revoke her administration but found out that the respondents are lawful heirs of the estate of the late Bakari Wema Kidemu. Dissatisfied with the finding, the applicant unsuccessfully appealed to the District Court of Lushoto.

Still dissatisfied by the decision of the District Court and having found out that she was caught by the law of limitation, the applicant preferred the instant application placing her grounds on illegality and sickness. The alleged illegalities are found in paragraph 5 and 6 of the affidavit of the applicant.

The matter was set for hearing and it was agreed that the hearing to proceed by way of written submission. The applicant was represented by Mr. Yona Lucas, learned counsel while the respondents were self-represented.

On the first point of illegality, the applicant is complaining that the birth certificates of the 1st, 2nd and 3rd respondents were not genuine for being photocopies, not certified and the original certificates were not tendered. It is his submission that, admission of these documents was contrary to the law. The counsel argues that the District Court wrongly blessed the decision of the Primary Court despite the alleged illegalities. The counsel further submitted that, the certificates differ from the ones obtained from RITA in respect of date of birth, names and entry number. The counsel therefore concludes that they are forged documents.

On the issue of endorsement which was raised as a second point of illegality, the counsel submitted that, the admitted copies of birth certificates were neither endorsed nor marked with any mark or signature to authenticate them which is contrary to law.

Submitting on the third point of illegality which was on the issue of unlawfully representation of 2nd to 4th respondents by the 1st respondent, the counsel argued that, the first respondent appeared before the Primary Court and the District Court alone while rest of the respondents did not appear. Further judgments of both court show that, the respondents were Joseph Wema Bakari and 3 others who were not

disclosed and it was not indicated that the matter before the Primary Court and the District Court was a representative suit. He therefore submitted that was wrong.

To support his submission on the illegality, the counsel referred the court to the case of **Principal Secretary, Ministry of Defence and National Service v Devram Valambhia [1992] TLR 185** and urged the court to grant the application as illegality in the proceedings by itself constitutes sufficient reasons to grant extension of time.

Submitting on the last ground, the counsel only stated that the applicant felt sick in mid-June 2022 and she was attended by the medical doctor.

In reply, the respondents contested the application. In the light of the birth certificate of the 1st respondent, the respondent avers that, the birth certificate was wrongly recorded and the matter was reported to RITA where the amended birth certificate was issued. In respect of the birth certificates of the 2nd and 3rd respondents, they submitted that, the certificates are genuine. The certificate which has been referred by the applicant is known to herself as it was applied by her for evil mind.

Replying to the claim of non-endorsement of the exhibit and the admission procedures, the respondents argued that, the ground should stand as a ground of appeal and not a point of illegality. To emphasis their stand, the respondents cited the cases of **Lyamuya Construction Company Limited v Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) and the case of **Gombe High School (Mkurugenzi wa shule ya sekondari Gombe Yared Febusa- phd) v Ruhwanya Kilangi** (PC) civil appeal No. 8 of 2020 where the courts held that for the extension of time to be granted, the applicant must demonstrate that, the point of law raised is apparent on the face of the record and not the one that would be discovered by a long drawn argument or process.

In wrapping up on illegality, the respondent submitted that, the applicant has failed to establish illegality and she neither questioned the issue of tendering of the exhibits at the Primary Court nor the District Court.

On the ground of sickness, the respondents avers that the same should not be considered and challenged the attached discharge form by the applicant for not being specific on the date when the applicant was

admitted. Moreover, the discharge form indicates that, the applicant was discharged on 30th June, 2022 while the current application was lodged on 17th July, 2022. In total, respondent argued that, the applicant has failed to account for each day of delay. To bolster their argument, they cited the cases of **Lyamuya Construction** (supra) and **Zuberi Nassor Mohd v. Mkundari Zanzibar, civil application No. 93/15 Of 2018.**

The respondents ultimately pleaded to this court to dismissed out the application with cost for lack of sufficient reason.

In rejoinder the applicant reiterated her submission in chief and added the following. In respect of the birth certificates of the 1st, 2nd and 3rd being photocopies and non indorsement, counsel rejoined that, this is purely point of law which does not require scrutinization of facts to assess it and sufficient to warrant application for the extension of time. He lastly rejoined that, the joint submission was not signed by each respondent and the purported signature of the 1st respondent differs from the one appearing in the counter affidavit.

Before going to the main application, let me tackle the issue raised by Mr. Lucas in respect of submission filed by the respondents but signed

by the first respondent on behalf of the rest of the respondents. Mr. Yona did not support his argument with any law or decision and he has not informed the court how the omission has prejudiced his client. In my view, I do not find the omission as fatal as submitted and much more it can be cured by the overriding objective principle which requires courts to deal with cases justly and to have regard to the substantive justice.

Having summarized the submission by the parties and having gone through the affidavit and counter affidavit, the central issue for consideration and determination is whether or not the applicant has demonstrated sufficient reasons to warrant the extension of time to appeal. The applicant's application has been predicated under section 14(1) of Cap 89 which grants discretionary power to the court for any reasonable or sufficient cause to extend the period of limitation for the institution of an appeal or an application. It is clear from the above provision that an extension of time is entirely on the discretion of the court and will be granted upon reasonable or sufficient cause. That has been emphasized by courts in various authorities such as **Tanga Cement Company v. Jumanne D. Masangwa & Another**, Civil Application no.

6 of 2001, the Court of Appeal (Unreported), where the Court held as follows:

"...an application for extension of time is entirely in the discretion of the Court to grant or refuse it. This unfettered discretion of the Court however has to be exercised judicially, and overriding consideration is that there must be sufficient cause for doing so. What amount to sufficient cause has not been defined. From decided cases a number of factors has been taken into account, including whether or not the application was brought promptly; the absence of any valid explanation for the delay; lack of diligence on the part of the applicant.

The applicant's application is premised on her sickness and illegalities as causes of delay and they are pointed out at paragraphs 5, 6 and 7 of her affidavit. As rightly submitted by the parties, the applicant must account for each day of the delay and further the alleged illegalities must be apparent on the face of the record. Illegality apparent on the face of the record constitutes a sufficient reason for extension of time and this has been the position and pronounced in various authorities including **VIP Engineering and Marketing Limited and Three Others v**

Citibank Tanzania Limited, consolidated Civil Reference No. 6,7 and 8 of 2006 CA (unreported) where the Court of Appeal stated:

"We have already accepted it as established law in this country that where the point of law at issue is the illegality or otherwise of the decision being challenged that by itself constitutes 'sufficient reasons' within the meaning of rule 8 of the Rules for extending time"

And in **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) the Court of Appeal elaborated on the applicability of the position, that:

*"Since every party intending to appeal seeks to challenge a decision either on point of law or fact, it cannot in my view, be said that in **VALAMBHIA'S** case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should as of right be granted extension of time if he applies for one. The Court there emphasized that **such point of law must be that 'of sufficient importance'** and, I would add that it must be apparent on the face of the record, such as the question of jurisdiction;*

In the application at hand, one of the reasons for the extension of time is the sickness of the applicant as deponed in paragraph 7 of the affidavit and I wish to determine this issue first. The applicant claims that, this is a good and sufficient ground to warrant the application while the respondents opposed on account that, the applicant has failed to account for each day of the delay. Sickness is an act which is beyond human control and is a good reason for delay if the applicant can prove that, the sickness prohibited her from taking necessary steps to appeal see **Alasai Josiah (suing by his attorney Oscar Sawuka) v Lotus Valley Ltd**, Civil Appeal No 498/12/2019, CAT. I have carefully considered annexure Che – 3 in the applicant's affidavit, the discharge form and the NHIF health provider in/out patient claim form. The former reveals that the applicant was discharged from hospital on 30/6/2022 the latter indicates the applicant attended hospital on 13/7/2022. The record reveals that the judgment was delivered on 30/5/2022 and the current application was lodged on 21st July, 2022. Assuming that the applicant was sick from the date she was discharged to the date she attended hospital, still we are not told where the applicant was sick between 13th July to 21st July, 2022 when the application was lodged. The only account comes from bar

submission and which is not accepted. As the law is clear that the applicant is required to account for each day, I hold that the applicant has failed to account for the period given above and prove that the sickness prohibited her from taking necessary steps to institute the appeal.

Turning to the illegalities, the applicant has raised three points of illegalities, one which goes to the reliance of photocopies of birth certificates of the 1st to the 3rd respondents by the Primary Court while the originals were not tendered, two the photocopies of birth certificates relied on were not indorsed, marked by any mark or signature to authenticate them by the Primary Court and three, the 2nd to 4th respondents were unlawful represented by the 1st respondent and their names were not indicated in the judgement.

I wish to make it clear that, despite the efforts made by the parties trying to drive this court to deal with issue of genuineness of the certificates of birth, I am afraid the issue is not part of the application before me and therefore it will not be dealt in here. That being the case, I wish to start with the first point of illegality which is about photocopies of the birth certificate which were relied by the court and their originals were not tendered. I had opportunity of going through the record and

warned myself of the danger of prematurely determining the appeal, however in my observation from the record, the alleged illegalities are vivid apparent on the face of the court record of the court. The alleged illegality contravenes Regulation 11(1)(a) of the Magistrate' Courts (Rules of Evidence in Primary Courts) Regulations which provides:

(1) The original document must always be produced

Except

(a) A copy of the original document may be produced if the original has been lost or destroyed or if it is in the hand of the opposing party and he will not produce it, but (unless) paragraph (b) of this exception applies) oral evidence must be given that it is true a copy of the original;"

The records shows that the alleged photocopies were relied by the Primary Court and District Court at page 9 and 12 of their decision to justify that the respondents are children of the deceased and hence, they are entitled to inherit from his estate, but it is vividly that the provisions of the above Regulation were not adhered to. I therefore, find the first point on illegality raised suffice as a good ground for the extension of time sought. Since this point alone is sufficient to grant the extension of

time sought, I will not consider the other points of illegalities raised by the applicant.

For what I have endeavor to state, it is my finding that, the applicant though has failed to account for each day of delay but she has managed to establish that there is illegality apparent on the face of the record on her first point worth granting the application for the extension of time.

Therefore, the application is granted, the applicant is granted thirty (30) days from the date of the delivery of this ruling to file her appeal. No order as to costs.

It is so ordered.

DATED at **TANGA** this 29th day of November, 2022

